

6508307, at *1 (Bkrtcy. E.D. Pa.) (citing *Westmoreland v. CBS, Inc.*, 770 F.2d 1168, 1179 (D.C. Cir. 1985)). “Courts have held that the lodestar method of calculating reasonable attorney’s fees is applicable to fees awarded under Rule 37.” *Id.* at *2; *see also Donaldson v. Informativa Corp.*, 2011 WL 3360200, at *1 (W.D. Pa.). “The Third Circuit has defined the lodestar method as ‘the initial estimate of a reasonable attorney’s fee . . . properly calculated by multiplying the number of hours reasonably expended on the litigation times a reasonable hourly rate.’” *Johnson*, 2005 WL 6508307, at *2 (quoting *Student Pub. Interest Research Grp. v. AT&T Bell Laboratories*, 842 F.2d 1436, 1441 (3d Cir. 1988)); *see also Pub. Interest Research Grp. of N.J., Inc. v. Windall*, 51 F. 3d 1179, 1188 (3d Cir. 1995) (stating that court calculating reasonable hours must “review the time charged, decide whether the hours set out were reasonably expended for each of the particular purposes described and then exclude those that are excessive, redundant, or otherwise unnecessary”) (internal quotation marks omitted). Hours are not reasonably expended if they are “excessive, redundant, or otherwise unnecessary.” *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983); *see also Rode v. Dellarciprete*, 892 F.2d 1177, 1183 (3d Cir. 1990); *Donaldson*, 2011 WL 3360200, at *2.

As the party seeking fees, Plaintiff has the burden of proof as to a reasonable award. *See Rode*, 892 F.2d at 1183; *Donaldson*, 2011 WL 3360200, at *1. Having reviewed the Bill of Costs submitted by Plaintiff, the Court concludes that Plaintiff has met its burden with respect to all but three items. For each of these three items, the description indicates that some unspecified amount of time was devoted to issues other than seeking to compel the deposition of Klein. The items are: (i) Mr. Smith’s entry for July 18, 2012, which included “analysis of discovery issues, *including* B. Klein deposition;” (ii) Mr. Smith’s entry for July 24, 2012, which included

“[a]nalysis of discovery issues *including* prepare for teleconference with court regarding motion to compel defendant B. Klein deposition;” and (iii) Mr. Smith’s entry for August 1, 2012, which includes preparation of a letter regarding the deposition of Abraham Weinstock. (D.I. 49-1 at 5-6) (emphasis added) These three entries generated fees of \$1,855; \$665; and \$1,225, respectively, for a total of \$3,745. The Court will reduce these three entries by half, reflecting the mixed nature of the work for which Mr. Smith was then billing. Therefore, Plaintiff is entitled to reimbursement for only \$1,872.50 of the fees associated with these three entries.

Accordingly, the Court will award Plaintiff all of the attorney fees and costs it requests (\$9,855.15) minus half of the amount associated with the three entries as described above (\$1,872.50). Thus, Defendant Klein will be ordered to pay Plaintiff \$7,982.65.

Plaintiff’s Second Request for Sanctions

The Court ordered Klein to appear for a deposition, to be held near her residence in Monroe, New York, on September 7, 2012. (D.I. 45) On September 6, 2012, Klein’s attorney notified MetLife’s attorney that Klein would not appear for her deposition on September 7, 2012 due to medical problems. A medical note provided by Klein’s physician, Dr. [REDACTED] MD, indicated that on September 4, 2012 Klein had received an [REDACTED] to ease a [REDACTED]; Klein was advised Klein not to engage in any work for at least a week.

Later on September 6, 2012, the Court held a teleconference with the parties. The Court declined to order Klein to appear for her September 7, 2012 deposition, but instead ordered that her deposition occur one week later, on September 14, 2012. Both sides agreed that the new deposition date was convenient. In particular, Klein’s attorney represented that Klein did not

have another medical appointment or any other obligation that would prevent her from attending a deposition on September 14, 2012. (See Sept. 6, 2012 Tr. at 6-7) Klein's attorney also agreed that it would be appropriate for his client to reimburse MetLife for the \$350 MetLife had paid to reserve a conference room in Monroe, New York for the deposition. (See *id.* at 6)

On September 12, 2012, Klein's attorney notified MetLife's attorney that Klein would, in fact, be unable to attend her deposition on September 14, 2012, due to medical complications. Klein provided MetLife with a letter from Dr. [REDACTED], MD PC, stating that on September 9, 2012, Klein had come to his office for an emergency visit and at that time had been "[REDACTED]" (D.I. 58 Ex. 1) Following examination, it was discovered that Klein had "[REDACTED]" and "[REDACTED]." (*Id.*) Dr. [REDACTED] opined that "proceeding with a deposition at this point could be dangerous to [Klein's] health," and advised Klein's attorney "with a degree of medical certainty, not to continue with any judicial proceedings that requires [Klein's] interaction, until her health stabilizes." (*Id.*)

On September 14, 2012, Klein provided a second letter, this one from Dr. [REDACTED] (D.I. 63 Ex. 1) Dr. [REDACTED] stated that he had seen Klein on September 14, 2012 for "[REDACTED]" and that "she has developed [REDACTED]." (*Id.*) He advised Klein to obtain a neurological evaluation. (*Id.*)

MetLife seeks sanctions for Klein's failure to appear for her deposition as scheduled on September 14, 2012. Specifically, MetLife seeks an order: (1) compelling Klein to attend her September 14, 2012 deposition; (2) imposing monetary sanctions for Klein's refusal to date to appear for her deposition; (3) deeming admitted MetLife's allegations against Klein set forth in MetLife's Complaint; (4) striking Klein's answer, affirmative defenses, and counterclaims;

(5) entering a default judgment against Klein; and (6) dismissing Klein's counterclaims. (D.I. 58 at 2-3) Klein responds that all of the sanctions requested by MetLife should be denied on the grounds that her health conditions establish just cause for her failure to appear for her deposition. (D.I. 63 at 2-3)

Given the record of an apparent deterioration in Klein's medical condition following September 7, 2012, the Court will deny without prejudice to renew Plaintiff's second request for sanctions, with the exception of the \$350 Plaintiff paid to reserve a room in Monroe, New York for the September 14, 2012 deposition. (Klein must also pay the \$350 cost of cancellation of the room for the September 7, 2012 deposition, as she agreed to do on the September 6, 2012 teleconference.) Plaintiff may renew its second request for sanctions should it deem it appropriate at a later stage in these proceedings.

Timing of Payments

In its September 13, 2012 letter, MetLife advises the Court that Klein has not yet paid the \$350 Klein agreed to pay MetLife during the September 6 teleconference about the scheduled September 7 deposition. Plaintiff requests that the Court set a date certain for Klein to make payment.

The Court will grant MetLife's request. Moreover, the Court will order Klein to pay the full amounts of sanctions that have been ordered to date ($\$7,982.65 + \$350 + \$350 = \$8,682.65$) no later than twenty-one (21) days following the date of this Memorandum Order.

Protective Order

The record developed to this point in this case creates substantial uncertainty as to whether, on the one hand, Klein is suffering from a series of severe medical conditions that

would make her appearance at a deposition dangerous to her physical and emotional well-being or, alternatively, whether Klein is improperly attempting to evade participating in a lawsuit to which she is a party and with respect to which she undoubtedly possesses relevant, discoverable information. In the Court's view, the burden remains on Klein to prove that her deposition should not go forward, if that continues to be her position. Accordingly, unless the parties reach an alternative, mutually agreeable resolution, Klein must seek a protective order if she wishes to delay or prevent her deposition. Klein will be required to seek such a protective order, if she seeks one, no later than fourteen (14) days after the date of this Memorandum Order.¹

Deposition of Abraham Weinstock

A significant lack of clarity surrounds MetLife's efforts to depose non-party Abraham Weinstock, who is married to Klein and is the father of Simon Weinstock, the president and sole shareholder of Defendant Star Lite Brokerage, Inc. ("Star Lite"). It is unclear to the Court: whether Mr. Weinstock has relevant, discoverable information; whether he has been properly served with a subpoena; whether he objects to appearing for a deposition if and when he is properly served; precisely what relief MetLife seeks from the Court with respect to a deposition of Mr. Weinstock; and what authority the Court has to grant any relief MetLife may be seeking.²

MetLife is granted leave to file any motion it deems appropriate with respect to whatever

¹Given the circumstances, Klein should expect that any request for a protective order that is not supported by sworn testimony from a qualified medical professional will likely be denied. It is also likely that an in-court hearing, at which the Court will need to see live witnesses in order to make credibility determinations, will be needed to resolve a protective order motion. Witnesses who will appear at such a hearing will need to be made available for a deposition prior to the hearing.

²The subpoena was issued by the United States District Court for the Southern District of New York. (D.I. 31 Ex. A)

relief it is seeking relating to Mr. Weinstock.³

Deposition of Joseph Glauber

MetLife requests an order directing non-party Joseph Glauber, who has been served with a subpoena for production of documents and for appearance at a deposition, to produce responsive documents no later than October 10, 2012 and to appear for a deposition on October 17, 2012. (D.I. 66 at 3) Mr. Glauber is not a party to this action, but evidently is an accountant who prepared Defendant Star Lite's income tax returns. It is unclear to the Court whether Mr. Glauber is represented by counsel, whether he objects to the relief requested by MetLife, and what authority MetLife is relying on in asking the Court to order the relief requested.⁴

MetLife is granted leave to file any motion it deems appropriate with respect to whatever relief it is seeking relating to Mr. Glauber.

MetLife's Motion for Leave to File Amended Complaint

MetLife seeks leave to file an amended complaint to add claims against a new defendant, Simon Weinstock, who is president and sole shareholder of Defendant Star Lite. (D.I. 42) MetLife filed its motion for leave on August 3, 2012, making it timely under the governing Scheduling Order, which required motions to join other parties and to amend the pleadings to be

³In a letter to the Court on August 20, 2012, MetLife requested either an order directing Mr. Weinstock to appear for a deposition or permission to serve Mr. Weinstock by Federal Express delivery. (D.I. 50) It is unclear whether MetLife continues to seek one or both of these forms of relief and, if so, on what authority the Court may grant such requests. MetLife will be granted leave to file a motion seeking whatever relief it wishes with respect to Mr. Weinstock, and Mr. Weinstock will have an opportunity, if he wishes to do so, to respond to any such motion.

⁴The subpoena was issued by the United States District Court for the Southern District of New York. (D.I. 36 Ex. A)

filed no later than August 6, 2012. (D.I. 26 ¶ 1)

“The court should freely give leave [to amend] when justice so requires.” Fed. R. Civ. P. 15(a)(2). In the absence of undue delay, bad faith, or dilatory motive on the part of the moving party, leave should be freely granted unless it causes undue prejudice to the non-moving party or would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). The Third Circuit has adopted a liberal approach to granting leave to amend. *See Dole v. Acro Chem. Co.*, 921 F.2d 484, 486–87 (3d Cir. 1990).

MetLife has not unduly delayed in seeking amendment, nor does the record reveal any basis to conclude that MetLife is acting in bad faith or with dilatory motive. Defendants will not be unfairly prejudiced by the addition of claims against Mr. Simon Weinstock. With the extension of discovery and case-dispositive deadlines being ordered by the Court, all parties will have sufficient time to complete discovery and prepare their case. The amendment is not futile.

Defendants oppose amendment on the ground that it fails to adequately state a claim for piercing of the corporate veil and the claims sought to be added are barred by the applicable statute of limitations. (D.I. 47) However, under the circumstances here, the allegations on which the effort to pierce the corporate veil rest – essentially that, based on his deposition testimony, Mr. Weinstock is owner and sole shareholder of Star Lite – are adequate, at this stage of the proceedings. Moreover, at this juncture the Court understands that MetLife, at the time it filed its original complaint, understood only that Mr. Weinstock was president of Star Lite. MetLife did not learn that Mr. Weinstock is also owner and sole shareholder of Star Lite until taking his deposition in July 2012. Under these circumstances, leave to amend should not be denied.

Accordingly, the Court will grant MetLife’s motion for leave to amend.

Redacted Versions

The parties are reminded of their obligation, pursuant to D. Del. L.R. 5.1.3 (adopting EM/ECF USER'S MANUAL (D. Del.), ch. XIV, sec. C (Jan. 2010) (*available at* <http://www.ded.uscourts.gov/manuals>)), to file publicly-available redacted versions of any sealed filings no later than seven (7) days after a sealed filing is accepted by the Court. The parties shall review the docket and file such redacted versions no later than seven (7) days after the date of this Order and shall comply with L.R. 5.1.3 going forward.

In addition, because today's Memorandum Order is sealed, the parties shall meet and confer and file, within seven (7) days of the date of this Order, a proposed public version of this Memorandum Order. Thereafter, the Court will file a publicly-available version of this Memorandum Order.

Conclusion

Accordingly, for the reasons stated above, IT IS HEREBY ORDERED that:

1. With respect to MetLife's first request for sanctions, Defendant Klein shall pay MetLife's reasonable attorney's fees and costs, which amount to **\$7,982.65**.
2. Klein shall pay MetLife **\$350** for the cost of reservation and cancellation of a conference room in Monroe, New York in which to take her deposition scheduled for September 7, 2012.
3. Klein shall pay MetLife **\$350** for the cost of reservation and cancellation of a conference room in Monroe, New York in which to take her deposition scheduled for September 14, 2012.
4. All of the foregoing amounts (which total **\$8,682.65**) shall be paid by Klein to

MetLife **no later than twenty-one (21) days** after the date of this Memorandum Order.

5. In all other respects, MetLife's second request for sanctions is **DENIED WITHOUT PREJUDICE** to renew at a later stage of these proceedings.

6. Any request by Klein for a protective order to further continue or preclude her deposition shall be filed **no later than fourteen (14) days** after the date of this Memorandum Order.

7. MetLife is granted leave to file a motion seeking relief relating to its efforts to compel Abraham Weinstock to appear for a deposition.

8. MetLife is granted leave to file a motion seeking relief relating to its efforts to compel Joseph Glauber to appear for a deposition.

9. MetLife's motion for leave to file an amended complaint (D.I. 42) is **GRANTED**. MetLife's amended complaint shall be filed in the form attached as exhibit 1 to said motion **within seven (7) days** of the date of entry of this Memorandum Order.

10. The parties shall comply with their obligations under L.R. 5.1.3 and file, **within seven (7) days** of the date of this Order, redacted versions of any of their filings which were made under seal, if such redacted filings do not already appear on the docket.

11. The parties shall meet and confer and file, **within seven (7) days** of the date of this Order, a proposed public version of this Memorandum Order.

12. In order to permit the discovery and other proceedings contemplated by the parties and this Memorandum Order to proceed, and in recognition of the reality that a new party and new claims are going to be added by the filing of an Amendment Complaint, and to provide the Court with the opportunity it may require to resolve further disputes (including discovery

motions), the Scheduling Order (D.I. 26) is AMENDED so that: (a) all discovery in this case shall be initiated so that it will be completed on or before **November 30, 2012**; and (b) all case dispositive motions, an opening brief, and affidavits, if any, in support of the motion shall be served and filed on or before **January 31, 2013**. In all other respects, the Scheduling Order remains in effect.

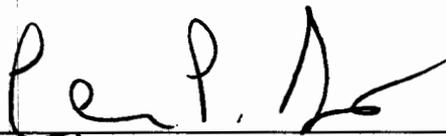
13. The parties shall provide the Court a joint status report, which shall among other things advise the Court of the status of issues relating to the depositions of Klein, Abraham Weinstock, and Glauber, **no later than ten (10) days** after the date of this Memorandum Order.

14. The Clerk of Court shall mail a copy of this Memorandum Order to Mr. Abraham Weinstock, at the Monroe, New York address listed in MetLife's letter (D.I. 50 at 2).

15. Defendant Klein's attorney is directed to make all reasonable efforts to ensure that Mr. Abraham Weinstock is provided a copy of this Memorandum Order.

16. Defendant Klein's attorney is directed to make all reasonable efforts to ensure that Mr. Joseph Glauber is provided a copy of this Memorandum Order.

September 24, 2012


UNITED STATES DISTRICT JUDGE